

ORIGINAL

Decision No. 59788

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations,
rates and practices of ALBERT S.
FITZ-GERALD, dba FITZ-GERALD BROS.)

Case No. 6196

Gordon, Knapp, Gill & Hibbert, by Warren N. Grossman,
for the respondent.
Karl K. Roos, for the Commission staff. ✓

O P I N I O N

On October 28, 1958, the Commission issued an order instituting an investigation on its own motion into the operations, rates and practices of Albert S. Fitz-Gerald, doing business as Fitz-Gerald Bros.

Public hearings were held in this matter on June 16, 1959 and on July 22 and 23, 1959, in Los Angeles, before Examiner William L. Cole. The matter was submitted on July 23, 1959, subject to the filing of late filed exhibits and briefs. These late filed exhibits and briefs have now been filed and the matter is ready for decision.

Order of Investigation

The order instituting investigation was issued for the purpose of determining:

1. Whether between November 1, 1957 and March 31, 1958, the respondent has charged, demanded, collected or received compensation for the transportation of property or for any service in connection therewith, in a lesser amount than the minimum rates and charges prescribed by the Commission relative to certain specified shipments.

2. Whether between such dates the respondent has issued shipping documents which did not show the description of the shipment in terms of the Western Classification or Exception Sheet or as otherwise legally prescribed by law and the regulations of this Commission.

3. Whether between such dates the respondent issued shipping documents which did not show the rate or charge assessed, contrary to the provisions of law and the regulations of this Commission.

4. Whether during the month of November 1957 the respondent operated any trucks for the transportation of property for compensation on any public highway within the State of California as a common carrier between fixed termini, as follows, to wit:

Between the Los Angeles Territory and Camp Cooke
Santa Barbara County;
Between the Los Angeles Territory and Oxnard;
Between the Los Angeles Territory and Santa Barbara;
Between the Los Angeles Territory and Ventura;

or over a regular route, without first having obtained from the Commission a certificate declaring that public convenience and necessity require such operation.

5. Whether the respondent has violated any other provision of law or the regulations of this Commission, including but limited to quoting or assessing rates or accessorial charges based upon a unit of measurement different from that prescribed by law and the regulations of this Commission, and the keeping of accounts, records or memoranda other than those prescribed by law and the regulations of this Commission.

Findings and Conclusions

Based upon all of the evidence of record, the Commission hereby makes the following findings and conclusions:

1. Albert S. Fitz-Gerald was issued Highway Contract Carrier Permit No. 19-37737 and Radial Highway Common Carrier Permit No. 19-37736 on July 28, 1949 which permits were in effect at the time

of the hearing in this matter.

2. The respondent was issued a certificate of public convenience and necessity to operate as a highway common carrier by this Commission in Decision No. 53640 in Application No. 36432. This certificate authorized the respondent to transport, as a highway common carrier, various specific commodities between the Los Angeles Drayage Areas as defined in the Commission's Minimum Rate Tariff No. 5, on the one hand, and Santa Maria and Betteravia, on the other hand; certain other specific commodities between the defined Los Angeles Drayage Area and Long Beach, on the one hand, and Santa Maria, on the other hand; and sugar between Betteravia, on the one hand and the defined Los Angeles Drayage Area and San Jose, on the other hand. This certificate specifically provides that the authority does not include the right to render service to, from or between intermediate points.

3. That the respondent has been served with all applicable Commission Minimum Rate Tariffs and Distance Tables and supplements thereto.

4. That in the months of November 1957, January 1958, and March 1958, the respondent transported various shipments of concentrated lemonade in cans, not refrigerated; that the point of origin for these shipments was Ventura, California, and the point of destination was either La Habra, California, or Anaheim, California; that for many of these shipments the respondent assessed and collected a charge based upon a flat rate of \$80.80 per shipment; and that further facts concerning these shipments together with the Commission's conclusion as to the applicable minimum charge therefor are set forth in the following table:

<u>Freight Bill No.</u>	<u>Date of Shipment</u>	<u>Point of Destination</u>	<u>Weight in Pounds</u>	<u>Charge Assessed</u>	<u>Applicable Minimum Charge</u>	<u>Amount of Undercharge</u>
SM 18633	11-29-57	La Habra	41,664	\$80.80	\$129.16	\$48.36
SM 17753	1-20-58	Anaheim	41,664	80.80	133.32	52.52
SM 17754	1-21-58	Anaheim	41,664	80.80	133.32	52.52
SM 17784	1-22-58	Anaheim	41,664	80.80	133.32	52.52
SM 18864	1-23-58	Anaheim	38,864	80.80	124.36	43.56
SM 18911	1-28-58	Anaheim	41,664	80.80	133.32	52.52
SM 18910	1-29-58	Anaheim	41,664	80.80	133.32	52.52
SM 18906	1-30-58	Anaheim	41,664	80.80	133.32	52.52
16719	3-15-58	La Habra	41,664	93.61	129.16	35.55
16724	3-18-58	La Habra	41,664	93.61	129.16	35.55
16728	3-20-58	Anaheim	41,664	98.08	133.32	35.24
16744	3-28-58	Anaheim	41,664	98.08	133.32	35.24

5. That with respect to the shipments referred to in paragraph 4, the only description of the commodity transported which the respondent placed on his respective freight bills was one or more of the following, to wit:

Pine Gold Regular
 Bel Air Lemonade
 Bel Air Pink Lemonade
 Scotch Treat Lemonade
 Dartmouth Lemonade
 Ideal Lemonade.

6. That commencing in the latter part of 1957, the respondent first started hauling lemonade; that he thought this commodity was exempt from the Commission's minimum rates as being a non-completed product; that, when he learned it was not an exempt commodity, he assessed a rate based upon the Commission's Minimum Rate Tariff No. 2, which, however, was an incorrect rate; that upon learning that he was still assessing an incorrect rate for this transportation, he wrote to the Commission in May of 1958 for the correct rate; that he has been assessing the correct rate since learning what it is; that in May of 1958, the respondent rebilled and collected the undercharges of many but, through oversight, not all of the lemonade shipments transported by him; that the balance of the lemonade shipments were rebilled on December 17, 1958, and the undercharges collected; and that the shipments hereinabove referred to in paragraph 4 were in the group of shipments rebilled on December 17, 1958.

7. That in addition to the lemonade shipments referred to in the previous paragraphs, the respondent, during the two periods November 4 through 8, 1957 and November 18 through 22, 1957, transported various other shipments between the City of Los Angeles, on the one hand, and Camp Cooke, Oxnard, Santa Barbara, and Ventura, on the other hand.

8. That the businesses which engaged the respondent to transport the shipments referred to in paragraph 7 between the City of Los Angeles and Camp Cooke are: Pacific Electric and Mechanical Co., Inc.; Dura Steel Products; Amco Electric; Fischback & Moore, Inc.; General Electric Company; Graybar Electric Company; Phelps-Dodge Copper Products; Paul Hardeman, Inc.; Eric Lundeen & Klass Bros., Inc.; Wells Industries Corp.; and Vinnell Company, Inc. The respondent transported shipments between the City of Los Angeles and Camp Cooke for these firms on each of the five days during the period November 4 through 8, 1957, and on each of the five days during the period November 18 through 22, 1957. The commodities transported on these shipments were: switch boxes and plates; steel fittings, flashings, parts, and bolts; structural steel; light fixtures; motor controls; electric boxes and switches; mineral wool; adhesives wire and conduit; electrical sockets; iron and steel inserts; rubber goods; ladders; paints and paint thinners; acoustical signal devices; and forms. The weight of these shipments ranged from one pound to in excess of 43,000 pounds.

9. That the business firms which engaged the respondent to transport the shipments referred to in paragraph 7 between the City of Los Angeles and Oxnard are: Academy Jr. Products Company; Aggeler & Musser Seed Company; Ferry Morse Seed Co.; Kelly-Springfield Tire Company; R. N. Nason & Co.; Paramount Paint & Lacquer Company; Signal Oil Company and Crandall & Sons. The respondent transported shipments

between the City of Los Angeles and Oxnard for these firms on each of the five days during the period November 4 through 8, 1957 and on each of the five days during the period November 18 through 22, 1957. The commodities transported on these shipments were: toy boxes, poultry feed, seed, tires and tubes, paint and paint thinner, and lacquer thinner. The weight of these shipments ranged from under 30 pounds to in excess of 3,000 pounds.

10. That the business firms which engaged the respondent to transport the shipments referred to in paragraph 7 between the City of Los Angeles and Santa Barbara are: Aggeler & Musser Seed Co.; R. N. Nason & Co.; Paramount Paint & Lacquer Co.; Solo Cup Company; Utility Fan Corp.-Utility Appliance Corp.; and Olympic Paint & Varnish Co. The respondent transported shipments for these firms on four of the five days during the period November 4 through 8, 1957 and on each of the five days during the period November 18 through 22, 1957. The commodities transported on these shipments were: seed, sprayers, insecticides, poultry feed, tools, paint, tape thinner, paper cups, and house furnaces. The weight of these shipments varied from 20 pounds to over 1200 pounds.

11. That the business firms which engaged the respondent to transport the shipments referred to in paragraph 7 between the City of Los Angeles and Ventura are: Distributor Supply Company; Kelly-Springfield Tire Co.; R. N. Nason & Co.; Olympic Paint & Varnish Company; Royal Metal Manufacturing Company; Solo Cup Company and U. S. Royal Rubber Company. The respondent transported shipments for these firms on three of the five days during the period November 4 through 8, 1957 and on four of the five days during the period November 18 through 22, 1957. The commodities transported on these shipments were: auto parts, tires, hardware, lacquer thinner, paint, chairs, and paper cups. The weight of these shipments varied from

less than 50 pounds to in excess of 900 pounds.

12. The respondent claimed at the hearing that at the time of the shipments referred to in paragraph 7, he had oral contracts with all of the shippers referred to in paragraphs 8, 9, 10 and 11, except the shipper Academy Jr. Products, with which he claimed no contract at all. Under their terms, there was no specified period of time during which these alleged oral contracts were to run. Under the terms of these alleged contracts, the shipper was under no obligation to give all his freight originating at any specific place to the respondent; he was not obligated to give any daily, weekly or monthly amounts of tonnage to the respondent; and the shipper was under no obligation to give the respondent any guaranteed compensation. Under the terms of the alleged contracts, the carrier was not obligated to furnish any specific type of equipment and he was not obligated to perform any specific type of service. At the time the shipments referred to in paragraph 7 took place, it was the respondent's understanding that, under the terms of the alleged contracts, there was nothing binding on either party to the contract. The freight to be hauled under these alleged contracts was to be in less than truckload lots.

13. Subsequent to the issuance of this order of investigation, the respondent had prepared by his attorney written documents purporting to be written contracts which certain but not all of the shippers referred to in paragraphs 8, 9, 10 and 11 signed. These documents each recite that an oral contract had theretofore existed between the respondent and the respective shipper which created the relationship of highway contract carrier and shipper and that "the parties desire to memorialize their contractual relationship through written contracts".

14. The respondent has obtained his new customers, both with respect to his certificated and permitted operations, through a combination of solicitation and recommendations by customers. In 1957, the respondent advertised in the classified section of the Los Angeles Telephone Directory. This advertisement did not make any reference to the various types of operating authority then held by the respondent. The respondent also advertises with desk calendars and pens. The respondent also has a point list showing the various points he ordinarily serves. These include points covered under his certificate of public convenience and necessity and other points. This point list does not, however, contain any indication that some of the points set forth thereon were served under one type authority and other points under another type of authority.

15. At the time of the hearing in this matter, the respondent had three terminals located in Santa Maria, Oxnard, and Los Angeles. He had at that time about 45 employees and about 106 pieces of equipment.

Rate Violations

Based upon the foregoing findings and conclusions and all of the evidence of record, it is the Commission's opinion and it so finds and concludes that with respect to the shipments hereinabove referred to in paragraph 4, the respondent violated Sections 3664 and 3667 of the Public Utilities Code by charging and collecting compensation for the transportation of property or for any service in connection therewith, in a lesser amount than the minimum rates and charges prescribed by law and the regulations of this Commission. The Commission further finds and concludes with respect to the shipments referred to in paragraph 4 that the respondent violated Item 255-C 1 (e) of the Commission's Minimum Rate Tariff No. 2 by issuing shipping documents which did not show the description of the related

shipments in terms of the Western Classification or Exception Sheet or as otherwise legally prescribed by law and the regulations of the Commission.

Status Violations

Based upon the foregoing findings and conclusions and all of the evidence of record, it is the Commission's opinion and it so further finds and concludes:

1. That the respondent has dedicated his property to the public and has held himself out to the public as a highway common carrier between the City of Los Angeles, on the one hand, and Camp Cooke, the City of Oxnard, the City of Santa Barbara, and the City of Ventura, on the other hand.

2. That the respondent transported, as a highway common carrier, the shipments hereinabove referred to in paragraph 7 for the shippers hereinabove referred to in paragraphs 8, 9, 10 and 11.

3. That during the period November 4 through 8, 1957, the respondent operated as a highway common carrier between fixed termini with respect to shipments transported by him between the City of Los Angeles and Camp Cooke and between the City of Los Angeles and the City of Oxnard and that during this period, the respondent operated as a highway common carrier between these two sets of termini.

4. That during the period November 18 through 22, 1957, the respondent operated as a highway common carrier between fixed termini with respect to shipments transported by him between the City of Los Angeles and Camp Cooke, the City of Los Angeles and the City of Oxnard, and the City of Los Angeles and the City of Santa Barbara and that during this period, the respondent operated as a highway common carrier between these three sets of termini.

5. That the respondent has never obtained a certificate of public convenience and necessity to operate as a highway common carrier between the City of Los Angeles, on the one hand, and Camp Cooke, the City of Oxnard, or the City of Santa Barbara, on the other hand.

6. That the respondent violated Section 1063 of the Public Utilities Code by operating as a highway common carrier between the City of Los Angeles, on the one hand, and Camp Cooke, the City of Oxnard, and the City of Santa Barbara, on the other hand, without first having obtained from the Commission a certificate declaring that public convenience and necessity require such operation.

The order of investigation in this matter, in referring to the status violations, spoke of the Los Angeles Territory rather than the City of Los Angeles. At the hearing, the staff stated that this territory consisted of an area encompassing the City of Los Angeles and other cities and also certain unincorporated territory located within the County of Los Angeles. This area was used by the staff because the respondent in an application filed August 25, 1958, requested the Commission to issue him a highway common carrier certificate of public convenience and necessity to operate from points located within this area, on the one hand, and Santa Maria, on the other hand, and intermediate points. The Commission staff introduced into the record at the hearing evidence of shipments transported by the respondent from various different points located in this area. It is the Commission's opinion, however, that this "territory" does not constitute a single terminus in determining whether or not the respondent is operating between fixed termini. It is the Commission's opinion that the City of Los Angeles does constitute such a terminus, however. For this reason, only those

shipments having origin or destination in the City of Los Angeles were considered in determining whether the respondent was illegally operating as a highway common carrier.

Rulings

At the time of the hearing, the staff requested that the Commission take official notice of the entire record made in the matter of the respondent's application for a certificate which is Application No. 40379. An objection was made to incorporating, through official notice, the entire record of the proceeding in that application; though no objection was made to the Commission taking official notice of the application itself. The ruling on this objection was taken under submission at the time and the objection is hereby sustained.

Likewise, at the time of the hearing, a motion was made to amend Exhibits 15 and 17. This motion was taken under submission at that time. The motion is hereby denied.

Penalty

In view of the violations hereinabove found it is the Commission's conclusion that all of the respondent's operating authority should be suspended for a period of five days. The respondent will also be ordered to examine its records during the period from July 1, 1957 to the present time to determine if additional undercharges exist and to collect any such additional undercharges found.

O R D E R

A public hearing having been held on the above-entitled matter and the Commission being fully informed therein, now therefore

IT IS ORDERED:

1. That Albert S. Fitz-Gerald cease and desist from operating

as a highway common carrier between the City of Los Angeles, on the one hand, and Camp Cooke, the City of Oxnard, and the City of Santa Barbara, on the other hand, unless he has first obtained a certificate of public convenience and necessity from this Commission to so operate.

2. That the respondent cease and desist from charging and collecting compensation for the transportation of property or for any service in connection therewith, in a lesser amount than the minimum rates and charges prescribed by law and the regulations of this Commission.

3. That the respondent's certificate of public convenience and necessity to operate as a highway common carrier and his permits to operate as a highway contract carrier and as a radial highway common carrier be suspended for a period of five days commencing at 12:01 a.m. on the second Monday following the effective date of this decision.

4. That Albert S. Fitz-Gerald shall post at his terminal and station facilities used for receiving property from the public for transportation, not less than five days prior to the beginning of the suspension period, a notice to the public stating that his certificate of public convenience and necessity to operate as a highway common carrier, his radial highway common carrier permit and his highway contract carrier permit have been suspended by the Commission for a period of five days. That within five days after such posting Albert S. Fitz-Gerald shall file with the Commission a copy of such notice, together with an affidavit setting forth the date and place of posting thereof.

5. That Albert S. Fitz-Gerald shall examine his records for the period from July 1, 1957 to the present time for the purpose of ascertaining if any additional undercharges have occurred other than those mentioned in this decision.

6. That within ninety days after the effective date of this decision, Albert S. Fitz-Gerald shall file with the Commission a report setting forth all undercharges found pursuant to the examination hereinabove required by paragraph 5.

7. That Albert S. Fitz-Gerald is hereby directed to take such action as may be necessary to collect the amounts of any additional undercharges found after the examination required by paragraph 5 of this order, and to notify the Commission in writing upon the consummation of such collections.

8. That, in the event charges to be collected as provided in paragraph 7 of this order, or any part thereof, remain uncollected one hundred twenty days after the effective date of this order, Albert S. Fitz-Gerald shall submit to the Commission, on the first Monday of each month, a report of the undercharges remaining to be collected and specifying the action taken to collect such charges and the result of such, until such charges have been collected in full or until further order of this Commission.

The Secretary of the Commission is directed to cause personal service of this order to be made upon Albert S. Fitz-Gerald and this order shall be effective twenty days after the completion of such service upon the respondent.

Dated at San Francisco, California, this 15th day of March, 1960

Robert W. Page
 President

Walter J. ...

E. L. Fox

Theodore ...

Commissioners

Commissioner Peter E. Mitchell, being necessarily absent, did not participate in the disposition of this proceeding.